No. 88-815

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

CENTRAL COLUMBIA SCHOOL DISTRICT and CENTRAL SUSQUEHANNA INTERMEDIATE UNIT NO. 16,

Petitioners,

vs.

RONALD POLK and CINDY POLK, Parents and Natural Guardians of CHRISTOPHER POLK,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the granting of a writ of certiorari is appropriate at this state of the proceedings, because of the Petitioner's refusal to respond to discovery requests; because the granting of summary judgment precluded the development of a complete record; and because the district court failed to address the lack of individuality of Christopher Polk's educational program?

II. Whether the issue relating to the applicable standard of benefit under the Education for the Handicapped Act is not ripe for decision at this stage because of the necessity of a remand to determine whether direct physical therapy is a required element of Christopher Polk's individualized educational program?

III. Whether the Third Circuit Court of Appeals followed the rulings of this Court when it found that a genuine issue of material fact existed as to whether a handicapped student was denied an individualized educational program by a rigid method of delivering physical therapy services with no direct therapy by a licensed therapist in violation of the procedural requirements of the Education for the Handicapped Act and hence, no important federal question is presented?

IV. Whether the Third Circuit Court of Appeals followed the rulings of this Court in finding that an appropriate education under the Education for the Handicapped Act requires more than a de minimis or trivial advancement in the educational program of a severely handicapped child, and that a genuine issue of material fact existed with regard to whether the educational benefits Christopher Polk received from his program were consistent with the Education for the Handicapped Act, and hence, no important federal question is presented?

V. Whether no actual conflict exists between the Circuit Courts of Appeal with regard to the applicable standard of benefits required by individualized educational programs under the Education for the Handicapped Act?

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COUNTERSTATEMENT OF THE CASE

The Polks first learned at the Administrative Hearing that no other handicapped children in public schools within the Intermediate Unit's[1] region received direct therapy from licensed therapists and recognized the possibility that Christopher Polk might be the victim of a blanket policy that denied Christopher an individualized education guaranteed by the EHA. Accordingly, after filing their complaint, the Plaintiffs propounded Interrogatories and a Request for Production upon the Intermediate Unit (Res. App. 9-12)[2] directed toward whether a blanket policy denying direct physical therapy existed in the Intermediate Unit. The Intermediate Unit refused to respond to the Interrogatories and the Request for Production and the district court directed compliance with the discovery requests (Res. App. 14-18) but the issue became moot when the district court granted a Motion for Summary Judgment. Even though the district court denied a motion to strike allegations relating to the lack of individuality in Christopher's program and ordered discovery on the issue, it never dealt with the contention that the consultative model is a rigid program that denies Christopher his right to an individualized education required by the EHA. The Third Circuit Court of Appeals found genuine issues of material fact and a procedural violation of the Education for the Handicapped Act and remanded the matter for further discovery and trial.

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[1] An intermediate unit in Pennsylvania provides special education programs to various school districts throughout a region—in this case, five counties.

[2] Respondents' Appendix.

Christopher Polk is a fourteen-year-old severely handicapped youngster suffering from cerebral palsy who, when he was twelve years old, functioned at a ten-month level. Christopher is unstable, with mobility difficulties, and needs assistance to ambulate; he creeps on his hands and knees or bunny hops from place to place. He has difficulty pulling himself up to stand and he needs support at his waist to walk. He suffers from severe muscle spasticity and was described as uncoordinated with involuntary movement in his upper extremities. He cannot move his hand to his mouth to feed himself without assistance.

From 1978 through 1982, Christopher was in a class for severely and profoundly retarded children, and from 1982 through 1986, he attended a trainable mentally retarded class. Until sometime in 1980, Christopher received direct physical therapy from a licensed therapist and has had a full-time classroom aide. In 1960 the Central Susquehanna Intermediate Unit stopped providing direct[3] physical therapy and initiated a consultative model[4] (Res. App. 3) under which a licensed physical therapist develops a program of exercise that is implemented by a classroom teacher and/or classroom aide, but provides no direct therapy. The district court found that under the consultative model, "no direct hands on therapy is given to Christopher by licensed physical therapists." (Pet. App. 3a, 4a)[5]

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[3] The Third Circuit defined "direct" physical therapy as "hands on" physical therapy (Petitioners' Appendix 7a).

[4] The Third Circuit Court of Appeals presented a thorough description of the consultative model. (Pet. App. 6a, 7a)

[5] Petitioners' Appendix.

Christopher receives no direct therapy from licensed therapists even though physical therapy is specified as a related service under the Education for the Handicapped Act (EHA), 20 U.S.C. 1401(17); is called for in his individualized educational program (IEP) (Res. App. 2); and the regulations promulgated under the EHA define physical therapy as "therapy provided by a qualified therapist." (34 CFR 300.13) The Polks contend and the Third Circuit Court of Appeals agrees that because of the degree of Christopher's physical involvement, physical therapy is the essence of Christopher's educational program. (Pet. App. 26a)

The Intermediate Unit had been working with Christopher for seven years to teach him to utilize ordinary silverware, and Christopher had yet to master the following skills: scooping with spoon; eating with a spoon; raising a spoon to his mouth; eating with a fork; and spearing food with a fork. After seven years Christopher's program continued to focus on the fundamental self-help skills of dressing and basic body movements.

Despite this apparent lack of progress, Christopher's IEP, because of the consultative model, is devoid of any educational goal or objective relating to decreasing spasticity, improving muscle tone, or using adaptive devices—goals that require treatment only by a licensed physical therapist and not merely exercises by a teacher or aide. Consequently, specific educational goals enumerated in the Intermediate Unit's computerized list of goals are excluded from Christopher's program. They are: goals that relate to development positions; normalized muscle tone; competence with a walker; manipulation of braces; toilet

transfer; walking and ambulation; protective reactions; and maintaining balance while changing positions—fundamentals to Christopher's education.

During the summer of 1985, Christopher took part in a privately sponsored physical therapy program at Shriners Hospital for crippled children in Philadelphia. Afterward, he no longer finger-fed and significant improvement was noted. Christopher also showed improvement in the areas of weight bearing and use of a walker as a result of weekly direct physical therapy provided by a privately retained physical therapist. Accordingly, the Respondents assert that delivery of physical therapy services exclusively through a consultative model is not appropriate for Christopher and he is thereby denied access to meaningful educational benefits. The Polks seek only two 45-minute physical therapy sessions by a licensed therapist per week.

The Intermediate Unit contends that under the consultative model a student can receive direct physical therapy. However, its Executive Director was not aware of any handicapped student in the Intermediate Unit who received direct physical therapy from a licensed physical therapist. (Res. App. 5) One of the two physical therapists who covers the five-county Intermediate Unit area acknowledged that of the sixty-five handicapped children whose IEPs call for physical therapy, none of them receive direct physical therapy. (Res. App. 6)

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ARGUMENT

I. WHETHER THE GRANTING OF A WRIT OF CERTIORARI IS APPROPRIATE AT THIS STAGE OF THE PROCEEDINGS BECAUSE OF THE PETITIONERS' REFUSAL TO RESPOND TO DISCOVERY REQUESTS; BECAUSE THE GRANTING OF SUMMARY JUDGMENT PRECLUDED THE DEVELOPMENT OF A COMPLETE RECORD; AND BECAUSE THE DISTRICT COURT FAILED TO ADDRESS THE LACK OF INDIVIDUALITY OF CHRISTOPHER POLK'S EDUCATIONAL PROGRAM?

Because the District Court granted summary judgment before discovery was completed, an incomplete record makes the granting of certiorari inappropriate. The District Court refused to strike from the Plaintiff's Complaint allegations claiming that Christopher's IEP was not individualized because of the rigid policy precluding direct physical therapy under the consultative model. The Intermediate Unit refused to answer interrogatories (Res. App. 9-13) and to respond to a request for production of documents (Resp. App. 7, 8) relative to whether the consultative model was, in fact, a rigid program that denied all handicapped students physical therapy. The district court ordered compliance with these discovery requests but the order became moot when the district court entered summary judgment without addressing whether Christopher's IEP was the product of an illegal blanket policy.

The inadequacy of the record is attested to by the attempt of counsel for the Intermediate Unit to "testify" in his petition for writ of certiorari that four students receive direct physical therapy. With due respect to coun-

sel, a proper response to the discovery requests would have provided a more complete record at all stages of the proceedings. (Petition, p. 3) Matters not in the record should not be considered by this court. *New Haven Inclusion Cases*, 399 U.S. 392, 90 S.Ct. 2054, 26 L.Ed.2d 691 (1970).

Similarly, with regard to the standard of benefit issue, since the Supreme Court in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), established a case-by-case analysis, a full trial record with specific findings of fact with regard to the nature and extent of educational benefit conferred by Christopher's educational program is required for a proper analysis by this Court.

Traditionally, the Supreme Court does not grant certiorari where a case involves a review of evidence for inferences drawn from them. *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 38 S.Ct. 140, 62 L.Ed. 385 (1918); *United States v. Johnston*, 268 U.S. 220, 45 S.Ct. 496, 69 L.Ed. 925 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 44 S.Ct. 164, 68 L.Ed. 413 (1924); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 58 S.Ct. 849, 82 L.Ed. 1273 (1938); *National Labor Relations Bd. v. Waterman S. S. Corp.*, 309 U.S. 206, 60 S.Ct. 493, 84 L.Ed. 704 (1940). While none of those cases deals with a finding by a circuit court of a genuine issue of material fact, the same principles apply to the present case where, after a review of the evidence and related inferences, the Third Circuit found there to be genuine issues of material fact with regard to the two issues before it. In those cases where the Supreme Court has granted a writ of certiorari and reviewed the reversal of

a grant of summary judgment, no genuine issue of material fact existed. *Irving Independent School District v. Tatro*, 469 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984); *Rowley*, 458 U.S. 176; *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977); *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); *United States v. Joseph V. Orleans*, 425 U.S. 807, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976).

Since this case is only at the summary judgment stage, no purpose is served by reviewing the Third Circuit Court's decision that genuine issues of material fact exist with regard to the "uniqueness" and "standards" issue.

II. WHETHER THE ISSUE RELATING TO THE APPLICABLE STANDARD OF BENEFITS UNDER THE EDUCATION FOR THE HANDICAPPED ACT IS NOT RIPE FOR DECISION AT THIS STAGE BECAUSE OF THE NECESSITY OF A REMAND TO DETERMINE WHETHER DIRECT PHYSICAL THERAPY IS A REQUIRED ELEMENT OF CHRISTOPHER POLK'S INDIVIDUALIZED EDUCATIONAL PROGRAM?

Since no important federal question exists with regard to the court of appeals' finding that a genuine issue of material fact exists as to whether the consultative model denies Christopher an individualized educational program, it is not necessary for this Court to consider, at this time, the issue relating to the applicable standard of benefits under the EHA. If, after trial, the district court finds that Christopher was subjected to an illegal rigid program, then the matter would be remanded to the Intermediate Unit so that Christopher would be considered as a candidate for

direct physical therapy. If Christopher were provided appropriate therapy, this matter would be moot.

If this court were to grant certiorari at this time to address the standards issue, the matter could be resolved by the lower court on grounds different from the standards issue. Judicial economy requires that the petition for writ of certiorari be denied.

III. WHETHER THE THIRD CIRCUIT COURT OF APPEALS FOLLOWED THE RULINGS OF THIS COURT WHEN IT FOUND THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED AS TO WHETHER A HANDICAPPED STUDENT WAS DENIED AN INDIVIDUALIZED EDUCATIONAL PROGRAM BY A RIGID METHOD OF DELIVERING PHYSICAL THERAPY SERVICES WITH NO DIRECT THERAPY BY A LICENSED THERAPIST IN VIOLATION OF THE PROCEDURAL REQUIREMENTS OF THE EDUCATION FOR THE HANDICAPPED ACT AND HENCE, NO IMPORTANT FEDERAL QUESTION IS PRESENTED?

The Third Circuit Court of Appeals found a genuine issue of material fact as to whether the Intermediate Unit has refused, as a blanket rule, to consider providing handicapped students with direct physical therapy from a licensed physical therapist. (Pet. App. 4a)

The Intermediate Unit incorrectly asserts that the Third Circuit Court of Appeals sua sponte considered the individuality issue. (Pet. Cert. p. 14) This issue was pled, raised and briefed as found by the Third Circuit. (Pet. App. 10a, Fn.7) It was the district court that ignored the issue when it precipitously granted the motion for summary judgment. While the Polks never questioned

the procedural due process hearing, the record reflects no stipulation with regard to compliance with the procedural aspects of the Education for the Handicapped Act as they relate to Christopher Polk's educational program. Such alleged stipulations are set forth in an issue, but that issue has not been briefed by the Intermediate Unit. The Intermediate Unit also alleges that Christopher is seeking an increase in services. This is not the case. Since Christopher Polk is denied direct physical therapy by the consultative model, he is simply seeking a related service provided by the Education for the Handicapped Act since the consultative model on its face does not comport with the definition of physical therapy contained in the regulations. The Polks are not seeking hospital treatment for their son that is unrelated to his educational program. They are seeking in-school therapy as a related service under the EHA. The Intermediate Unit's assertion that direct therapy is not an educational service is contrary to 20 U.S.C. 1401(17) and *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984).

In declaring the application of a blanket rule to a handicapped student illegal, the Third Circuit Court of Appeals cited *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 73 L.Ed.2d 690, 102 S.Ct. 3034 (1982) for the proposition that a state must devise an individualized program that addresses the handicapped child's "unique needs". (Pet. App. 14a) The Supreme Court in *Rowley* specifically stated that the free appropriate public education required by the EHA is tailored to the *unique** needs of the handi-

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* Emphasis added.

capped child (458 U.S. at 181), and that procedures must be adopted which would result in *individualized** consideration of instruction for each child.

The Third Circuit Court of Appeals also relied upon *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3rd Cir. 1980), cert. denied 452 U.S. 968 (1981) and *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983), vacated in part on other grounds 468 U.S. 1213 (1983), reinstated in relevant part 740 F.2d 902 (1984), cert. denied 469 U.S. 1228 (1985), where rigid programs limiting education for handicapped children to 180 days were declared illegal.

In *Tatro*, 468 U.S. 883, the Supreme Court acknowledged the importance of related services under the EHA when it unanimously required a school district to provide in-school catheterization so that a handicapped child could attend regular classes, and noted that Congress intended schools to provide specially trained personnel to help handicapped children. Similary the Intermediate Unit may have to hire more than two therapists to serve its handicapped population. The *Irving* court cited 20 U.S.C. 1401(18) and noted that a "free appropriate public education" is defined as "special education and related services."

The Third Circuit Court of Appeals emphasized the importance of physical therapy to physically handicapped children because the physical problems may impede educational development in other areas, believing that in some instances physical therapy may be the core of a disabled child's special education program. (Pet. App. 12a)

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* Emphasis added.

The Third Circuit Court of Appeals, in finding a genuine issue of material fact, placed weight upon the Plaintiff's assertion that the Intermediate Unit never considered Christopher's unique need for physical therapy because of a rigid policy that precluded direct therapy. The court noted that none of the sixty-five children in the Intermediate Unit whose individualized educational programs call for physical therapy actually receives direct physical therapy (Pet. App. 13a), contrary to the assertion of the Intermediate Unit. (Petition, p. 15)

Contrary to the assertion of the Intermediate Unit, its own description of the consultative model (Res. App. 3, 4) shows no flexibility in the program with regard to direct therapy. In reversing the judgment of the district court, the Third Circuit Court of Appeals drew all reasonable inferences in favor of the non-moving party and believed that the Plaintiff should be given an opportunity to continue his discovery into whether the consultative model was an illegal, rigid program. (Pet. App. 15a, 16a)

Under Supreme Court Rule 17(c) no important question of federal law is presented because the Third Circuit Court of Appeals simply found a genuine issue of material fact based upon the dictate of the EHA that educational programs must be individualized and take into account handicapped children's unique needs.

IV. WHETHER THE THIRD CIRCUIT COURT OF APPEALS FOLLOWED THE RULINGS OF THIS COURT IN FINDING THAT AN APPROPRIATE EDUCATION UNDER THE EDUCATION FOR THE HANDICAPPED ACT REQUIRES MORE THAN A DE MINIMIS OR TRIVIAL ADVANCEMENT IN THE EDUCATIONAL PROGRAM OF A SEVERLY HANDICAPPED CHILD, AND THAT A GENUINE ISSUE OF MATERIAL FACT EXISTED WITH REGARD TO WHETHER THE EDUCATIONAL BENEFITS CHRISTOPHER POLK RECEIVED FROM HIS PROGRAM WERE CONSISTENT WITH THE EDUCATION FOR THE HANDICAPPED ACT, AND HENCE, NO IMPORTANT FEDERAL QUESTION IS PRESENTED?

The Intermediate Unit contends that the Third Circuit disregarded the teachings of *Rowley*, 458 U.S. 176, by applying a broad standard of educational benefit. To the contrary, the Third Circuit's holding is narrow and wholly consistent with *Rowley* and the EHA. The Appeals Court simply held that the EHA requires that an educational program provide more than a trivial educational benefit. (Pet. App. 21a)

The Third Circuit Court of Appeals acknowledged that *Rowley* prohibits standards of benefit that require maximizing potential and interference with educational methods. The Third Circuit noted the Supreme Court in *Rowley* specifically chose not to establish any one test to determine the adequacy of benefits required by the EHA. *Rowley*, 458 U.S. at 202. Moreover, *Rowley* does not eliminate all judicial responsibility for review of the substantive quality of educational programs and specifically required that access to education for handicapped children be meaningful. *Rowley*, 458 U.S. at 192.

In *Irving Independent School District v. Tatro,* 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), this Court specifically rejected the argument that the federal courts have no role in the substantive review of state educational programs. (468 U.S. at 890, 82 L.Ed.2d at 672, Fn.6) The *Irving* Court specifically required an analysis relating to a school's substantive obligation under the "related services requirement" of Section 1401(17). The present case presents the substantive question as to whether denial of direct therapy to Christopher Polk violates the EHA. If the standard suggested by the Intermediate Unit were to prevail, even the restricted scope of substantive review would be eliminated and the Education for the Handicapped Act would become meaningless.

The Third Circuit simply found that there was a genuine issue of material fact as to whether Christopher was receiving only trivial or de minimis benefit. The Intermediate Unit focuses on the Supreme Court's use of the phrase "some benefit" in *Rowley* and argues that the Court meant "some benefit no matter how insignificant." In *Rowley* the Supreme Court accepted the finding by the district court that Amy Rowley's benefits were substantial. The Intermediate Unit also ignores the statement by the Supreme Court that access to education must be meaningful.

The Third Circuit's decision that the EHA requires more than trivial educational advancement is supported by its analysis of the Act's legislative history. (Pet. App. 23a-26a) The appeals court also distinguished the present case from *Rowley* because in *Rowley* the Supreme Court specifically limited its decision to the facts before it; because *Rowley* dealt with a request for extraordinary

assistance whereas physical therapy is recognized by the EHA as a related service; and because Christopher's severe condition required an analysis different than that given Amy Rowley.

The Third Circuit Court of Appeals found that a genuine issue of material fact existed as to whether Christopher was receiving only trivial educational benefits (Pet. App. 34a) under the EHA based upon evidence showing rapid progress after direct physical therapy was provided by Shriners Hospital for Crippled Children and by a private therapist; because the Intermediate Unit was working on the same skills for a number of years; because of the testimony from Christopher's therapist that the delivery of physical therapy through a consultative model is not appropriate for Christopher; and because certain educational goals, such as improvement of muscle tone, can be delivered only by a licensed physical therapist.

The Intermediate Unit asserts that *Rowley* would uphold an educational program that provided any benefit no matter how trivial or meaningless, and asserts that the limited skills Christopher has were the result of public education, because he had no skills before he started, and ignores the fact that he is deprived of access to direct physical therapy, a very important part of his program.

The Intermediate Unit also argues that nowhere in *Rowley* "are meaningful benefits a substantive requirement under the EHA." (Petition p. 9) Is it really the position of the Intermediate Unit that the requirements of the EHA be programs that provide "meaningless benefits"?

The question to be resolved at trial is whether Christopher's educational program, absent direct physical ther-

apy, provides the benefits to which Christopher is entitled under the EHA. The Third Circuit's Opinion that there was a genuine issue of material fact that benefits were denied is consistent with *Rowley*, and no important question of federal law has been presented under Supreme Court Rule 17(c).

V. WHETHER NO ACTUAL CONFLICT EXISTS BETWEEN THE CIRCUIT COURTS OF APPEAL WITH REGARD TO THE APPLICABLE STANDARD OF BENEFITS REQUIRED BY INDIVIDUALIZED EDUCATIONAL PROGRAMS UNDER THE EDUCATION FOR THE HANDICAPPED ACT?

No actual conflict exists between the circuit courts with regard to the application of the standard of benefit required by the EHA. The lower courts have applied the case-by-case analysis required by *Rowley* to varied patterns generated by a plethora of handicapping conditions. The cases cited by the Petitioner do not show a conflict.

For example, in *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), the Fourth Circuit followed *Rowley* acknowledging that no single substantive standard can describe how much educational benefit is sufficient to satisfy the Act. In *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983), the First Circuit applied *Rowley* and required residential placement for a severely handicapped child with significant behavior problems. Just as access to physical therapy is essential to Christopher Polk's educational progress, access to residential care was essential for the student in *Abrahamson* to make any educational progress at all. Some benefit of a trivial nature would be achieved in a day program, but the program would not have been appropriate for the student's needs.

In *Crawford v. Pittman*, 708 F.2d 1028 (5th Cir., 1983), the Fifth Circuit Court of Appeals dealt with a categorical 180-day limit, and made reference to the phrase "some educational benefit," but the case did not deal with a specific program on handicapping conditions.

In *Springdale School District No. 50 v. Grace*, 693 F.2d 41 (8th Cir., 1982) a school district challenged a recommended placement in a private school for the deaf. The circuit applied *Rowley* to find that placement in the regular classroom was appropriate. In *Dept. of Education, State of Hawaii v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983), the Ninth Circuit Court of Appeals found that home bound instruction was inappropriate for a handicapped student who could function in a mainstream environment. The analysis of *Rowley* in *Grace* and *Katherine D.* is complicated by the policy of the EHA favoring mainstreaming.

The Third Circuit Court of Appeals and the other circuits are consistently applying the case-by-case analysis required by *Rowley* and are requiring programs that provide meaningful access to educational programs with more than trivial educational benefits, and no actual conflict exists under Rule 17(a).

CONCLUSION

Since the Supreme Court generally does not review evidentiary matters, it should defer to the judgment of the Third Circuit Court of Appeals that genuine issues of material fact exist. The sparse record presented to the Court would make review of the issues unproductive at this stage of the proceedings.

Moreover, since the Supreme Court in *Rowley* established a case-by-case analysis of sufficiency of benefits under the EHA, no important federal issue is presented since the Third Circuit's decision was consistent with the benefit standards and individualized education requirements of the EHA and the ruling of this Court.

The Respondents should be permitted to pursue their action through trial to show, as they contend, that the consultative model is a deliberate attempt to eliminate direct physical therapy as a service to handicapped children in the Central Susquehanna Intermediate Unit.

Respectfully submitted,

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INDIVIDUALIZED EDUCATION PROGRAM

Student Christopher Polk — Date IEP Developed ———

Birthdate 12/17/73 — Evaluator(s) Kathy Divalerio

Dist. of Residence Central Columbia — Special Program Trainable Mentally Retarded

Special Education Primary Assignment(s)	Full, Part-time or Itinerant	Date Started/ Duration	Personnel/Title
Trainable Mentally Retarded	Full-Time	8-85 - 8-86	Kathy Divalerio Spec. Ed. Teacher
Speech and Language	Itinerant	8-85 - 8-86	Barb King Speech Correctionist

Regular Classroom Activities Provided: None

Related Services	Individual or Special Class	Date Started Duration	Personnel/Title
Bus Transportation	Individual	8-85 - 8-86	T. Marquette
Domestic	Special Class	8-85 - 8-86	Team Director J. Points Music Teacher
Physical Education	Special Class	8-85 - 8-86	N. Evans Phys. Ed. Teacher
Occupational Therapy Consultation	Individual once per mo. or as needed	8-85 - 8-86	(Illegible) Occ. Therapist
Physical Therapy Consultation*	**Individual once per mo. or as needed**	**8-85 - 8-86**	**P. Checki Phys. Therapist**

Special Devices/Materials/Methods:

— Hearing Aid — Wheelchair — Special Lighting
— Sign Lang. ✓ Braces — Lrg. Print Texts
✓ Lang. Board — Other — Sound Amplification
— Head Protector

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* Emphasis added.

CURRENT EDUCATIONAL PERFORMANCE

TEST/INFORMAL DEVICE	DATE	RESULTS
CBIS Objectives	9/85	Beginning Readiness Level
Teacher Made Readiness Checklist	4/85	
TMR School Competency Scales	4/85	15th Percentile (Full-Scale)

DESCRIBE PERFORMANCE IN GENERAL TERMS: Chris' self-help skills are slowly improving. He is eating more independently and assists during toileting. Chris is at a beginning readiness level in cognitive skills. Chris is able to locate all self-identification information on his language board. He can correctly match the letters of his name, read his full name, and discriminate some colors and shapes. Chris' attention span and cooperation have improved over the past year, through his visual attention to a task continues to be a weakness. His distractability causes much inconsistency in his work. Chris has begun to work independently for short periods of time on tasks which he enjoys.

PHYSICAL THERAPY/OCCUPATIONAL THERAPY CONSULTATION MODEL PHILOSOPHY

A consultation model for the delivery of Physical and Occupational Therapy services provides students with a more continuous and enriched educational experience. A consultation model attempts to combine and integrate PT/OT activities within the realm of everyday teaching activities, utilizing the classroom teacher as the primary resource. The thrust of a consultation model of PT/OT is not to provide the traditional treatment as available in medical and health care settings.

In the consultation model, the therapist interacts with the classroom teacher and/or other educators who deal with the child on a regular and consistent basis and who are ultimately responsible for the child's educational performance. The therapist as a consultant increases the teacher's awareness of a handicapped child's need. The therapist instructs the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences.

The Occupational Therapy Consultant evaluates and provides activity suggestions and recommendations relating to the individual education program for fine motor development, sensory perceptual integration, upper extremity development, self-care and adaptive equipment as needed. Specific examples might include: a hand strengthening activity, an adaptive pencil, feeding device or sensory activities in order to enable the child to meet the demands of school, play and social life.

A Physical Consultant provides recommendations to school personnel for the physically disabled individual. These recommendations include techniques and methods to improve muscle strength, balance, coordination, range of motion, gross motor functioning, ambulation, posture and adaptive seating . This consultation service is provided to enhance the student's performance in the classroom by meeting his or her individual needs.

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(p. 70) Dr. Herman—Cross

in another part of the building; and so for some specific activities, the youngster could, in fact, be removed from the classroom and that activity take place and then return. That could happen.

Q. It could. Are you aware in the entire intermediate unit of any such situation?

A. Not personally, no.

Q. Who would be aware of that?

A. The physical therapist who deals directly with the kids.

Q. Who was the supervisor in charge of all PT and OT?

A. Edward Glennan.

Q. And you are saying it is within the consultive model where a student could receive direct physical therapy services within the school?

A. Yes.

Q. But off the top of your head, you don't know if that is being provided?

A. I have no first-hand knowledge of that, no.

Q. Are you aware of any criteria from management on down to guide the multi-disciplinary team to determine when the consultive model should be used, when the direct therapy should be used, and

• • •

* * *

(p. 144) Mrs. Merrill—Cross

that aspect of the IEP, and there is no dispute there is progress because of this. Do you understand where we are coming from?

A. Yes.

Q. We will use then treatment, which is probably a good suggestion. Did you ever recommend treatment for Chris?

A. No.

Q. Why is that?

A. Because I felt that the consultation model provided nicely for him. I didn't think, and I don't think now, that treatment is needed for him to make progress because he shows he is making progress during the consultation model.

Q. Do you treat other students?

A. Through the consultation model.

Q. Outside the consultation model, not to confuse you.

A. Not treatment that you would traditionally find in a hospital setting.

Q. Do you know of any physical therapist who treats handicapped children in the school system outside the consultative model?

A. In SIU, no.

Q. You know of none?

* * *

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of Christopher Polk, Plaintiffs,	)	CIVIL NO. 86-1784
VS.	)	Complaint filed 12/17/86
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT #16, CENTRAL COLUMBIA AREA SCHOOL DISTRICT and BLOOMSBURG AREA SCHOOL DISTRICT, Defendants.	)	(Judge Muir)

PLAINTIFF'S FIRST REQUEST TO PRODUCE DOCUMENTS TO DEFENDANT CENTRAL SUSQUEHANNA INTERMEDIATE UNIT

You are requested to produce at the law office of Hummel, James & Mihalik, 29 E. Main St., Bloomsburg, PA 17815-1989, within forty-five days of service hereof, at reasonable expense, the following:

1. All individualized educational programs for the school year 1985-1986, after appropriate measures have been taken to protect the confidentiality interest of the student whose IEP calls for the delivery of physical and/or occupational therapy services.

RESPONSE: This request is objected to as being beyond the scope of discovery, unduly burdensome and intended for purposes of harassment.

2. All materials relating to physical and/or occupational therapy for each of the students set forth above

that were utilized for the preparation of each individualized educational program.

RESPONSE: This request is objected to as being beyond the scope of discovery, unduly burdensome and intended for purposes of harassment.

LAW OFFICES OF
DERR, PURSEL & LUSCHAS
GARY E. NORTON, ESQUIRE
Attorney for Defendants
238 Market Street
Bloomsburg, PA 17815

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

BY:_____
Frank J. Lavery, Jr., Esq.
130 Locust Street
P.O. Box 811
Harrisburg, PA 17108-0811

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of CHRISTOPHER POLK,	)	
Plaintiffs,	)	
VS.	)	
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; CENTRAL COLUMBIA AREA SCHOOL DISTRICT; and BLOOMSBURG AREA SCHOOL DISTRICT,	)	CIVIL ACTION NO. 86-1784
Defendants.	)	

PLAINTIFFS' FIRST SET OF INTERROGATORIES TO SUSGUEHANNA INTERMEDIATE UNIT

You are required to answer the within Interrogatories in writing and under oath, within forty-five (45) days from date of service thereof and serve a copy upon Counsel for the Plaintiff. These Interrogatories are deemed to be continuing.

1. During the 1985-86 school year, set forth the number of students whose individualized educational programs called for either physical therapy or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

2. Of the students set forth above, set forth the number who received during the school year direct hands on physical therapy not part of the consultive model through which the therapist works with the teacher or the teachers aid in the delivery of physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

3. Set forth the date when the consultive model was adopted by Intermediate Unit 16 for the delivery of physical and occupational therapy services.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter.

4. Set forth the date that the consultive model for the delivery of physical and occupational services was implemented.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter.

5. Set forth the manner in which physical therapy and occupational therapy services were delivered to handicapped students prior to the implementation of the consultive model.

This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient

source and that this subject was covered in a prior hearing on this matter.

6. Set forth the names and addresses of all persons responsible for the adoption and implementation of the consultive model for the delivery of occupational services.

Dr. George Herman, Central Susquehanna Intermediate Unit, Box 213, Lewisburg, PA 17837.

7. For each of the students whose individualized educational programs provide for occupational and/or physical therapy set forth a description of the handicapping condition and the program in which the student was enrolled for the 1985-1986 program.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

8. For each of such students set forth in the preceeding Interrogatory, identify all documents that gave rise to the determination that the student was entitled to physical and/or occupational therapy under the Education for the Handicapped Act.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

9. With respect to each student, set forth in Interrogatory No. 8 identify all documents which the Defendants rely upon to justify the proposition that the delivery of physical and/or occupational therapy was appropriate through the consultive model rather than hands-on or-direct therapy since the implementation of consultive model.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

10. Has any student or person on the student's behalf challenged the appropriateness of the delivery of physical or occupational therapy services through the consultive model?

No.

11. If so please identify all documents relating to such challenge.

See No. 10.

12. From the date of the implementation of the consultive model to the start of the 1985-86 school year, set forth the number of students whose Individualized Educational Programs called for either physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

13. Of the students set forth above, set forth the number who received during the school year direct hands-on physical therapy not part of the consultive model through which the therapist works with the teacher or teachers aid in the delivery of physical or occupational therapy.

This interrogatory is objected to as being outside the scope of discovery and unduly burdensome.

LAW OFFICES
HUMMEL, JAMES & MIHALIK

/s/ John A. Mihalik
JOHN A. MIHALIK, ESQUIRE
29 E. Main St.
Bloomsburg, Pa. 17815

MARSHALL, DENNEHEY, WARNER,
COLEMAN & GOGGIN

Dated: 2/17/87

By: Frank J. Lavery, Jr.
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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

RONALD POLK and CINDY POLK, parents and natural guardians of CHRISTOPHER POLK,	)	
Plaintiffs,	)	Civil No. 86-1784
vs.	)	Complaint Filed 12/17/86
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16; et al.,	)	(Judge Muir)
Defendants.	)	

ORDER #1 of

JULY 21, 1987

(Filed July 21, 1987

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

This case is currently on our September, 1987, trial list. On May 29, 1987, the Plaintiffs filed a motion to compel answers to interrogatories. A brief in support thereof was filed June 12, 1987. Central Susquehanna Intermediate Unit 16 (hereinafter Intermediate Unit 16) filed an opposing brief on June 30, 1987. On July 15, 1987, the Plaintiffs filed a reply brief and the matter became ripe.

Plaintiffs filed this complaint on December 17, 1986 under the Education for the Handicapped Act, 20 U.S.C. § 1400 *et seq.*, seeking hands-on physical therapy for Chris-

topher Polk, a handicapped student in the Central Columbia School District. The School District has delegated its responsibility for providing special education services to Intermediate Unit 16. The complaint alleges that the Intermediate Unit provides physical therapy to Polk through a consultive model whereby a licensed therapist sets up the program which is delivered by a classroom teacher and aide. The Plaintiffs allege that this type of therapy is inadequate. They assert that Polk requires hands-on therapy by a licensed physical therapist on a regular basis.

On December 23, 1986, the Plaintiffs served upon Intermediate Unit 16 a set of 13 interrogatories. Only interrogatories 6, 10 and 11 were answered with an answer other than "This interrogatory is objected to as being outside the scope of discovery and unduly burdensome." or "This interrogatory is objected to as being unreasonably cumulative and obtainable from a more convenient source and that this subject was covered in a prior hearing on this matter." Based on these answers, Plaintiffs seek an order compelling answers and sanctions pursuant to Local Rule 402.9 and Fed.R.Civ.P. 37(a)(4). We shall address each of these requests *seriatim*.

Fed.R.Civ.P. 26(b) provides for broad discovery. Any matter which is relevant and not privileged is discoverable. In short, any matter which is germane to the subject or could reasonably lead to other information which is relevant to any issue in the case is discoverable. Oppenheimer Fund, Inc. vs. Sanders, 437 U.S. 340 (1978). The District Court's power to compel discovery is broad and we should favor full and fair disclosure while only protecting against questions which are burdensome, un-

reasonably complex, or clearly irrelevant. Felix A. Phillet, Inc., vs. Kelly-Springfield Tire Co., 41 F.R.D. 55, 57-58 (E.D. Pa. 1966). *See also* 4 Moore, Fed.Prac. & Proc. § 26.16.

We construe the two separate statements of objections to the interrogatories made by Intermediate Unit 16 as one general objection on the grounds of relevancy and burdensomeness. It is Intermediate Unit 16's position that the only question before this Court is whether Christopher Polk is receiving a free and appropriate public education pursuant to 20 U.S.C. § 1412(1) and in order to determine that we need only determine whether the program Polk is enrolled in is reasonably calculated to enable him to receive educational benefits. *See* Hendrick Hudson School Dist. vs. Rowley, 458 U.S. 176 (1982). While we are aware that the issues in this case must flow directly from the statute, discovery is not so limited. Discovery may be had on items which may later be found to be irrelevant and excludable at trial. Furthermore, discovery may be had of items which in and of themselves are not relevant but which could lead to other relevant matters.

All of the interrogatories clearly deal with the education Polk and others are receiving. We are of the view that they are proper and not burdensome. Most can probably be answered by an appropriate official at the Intermediate Unit without the expediture of much time or effort.

Having determined that the interrogatories propounded were proper and should be answered, we must now ascertain whether or not sanctions should be imposed pursuant to Local Rule 402.9 and Fed.R.Civ.P. 37(a)(4). Lo-

cal Rule 402.9 allows sanctions, including the payment of reasonable expenses and attorney's fees if a party abuses the discovery process by resisting discovery. Fed.R.Civ.P. 37(a)(4) states that a Court shall award reasonable expenses ". . . unless the Court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Intermediate Unit 16 in its opposing brief filed June 30, 1987, fails squarely to address the issue of sanctions. Instead, the Intermediate Unit discusses the merits of this case and the issues involved, stating that because the issue in this case is narrow, discovery must be narrow. We are of the view that this position was not well taken because discoverable material need not be relevant in and of itself if it can lead to other relevant evidence. This, coupled with the fact that the Intermediate Unit has failed squarely to address the issue of sanctions in its brief in opposition to the motion to compel, is disturbing.

The burden of persuasion is clearly on the party who has lost in the motion to compel to avoid the assessment of expenses and fees rather than on the winning party to obtain such an award. The key element of Rule 37(a)(4) is that the loser pays. *See e.g.*, 8 Wright & Miller Fed. Prac. & Proc., § 2288 (1980) and cases cited at n. 26. Nevertheless, we are hesitant to award fees at this time because the point has not been fully addressed. We shall require the parties to attempt to work out the issue of sanctions. If this is not possible, the movant shall reapply for such expenses in accordance with the dispositive portion of this order.

NOW, THEREFORE, IT IS ORDERED THAT:

1. Plaintiffs' motion to compel interrogatories and for sanctions filed May 29, 1987, is granted insofar as it requests that we order full and complete answers to the interrogatories propounded and denied without prejudice insofar as it requests sanctions.

2. Central Susquehanna Intermediate Unit No. 16 shall within 15 days of the date of this order fully and thoroughly answer the interrogatories propounded to it.

3. Counsel for the Plaintiffs and Central Susquehanna Intermediate Unit 16 shall confer, although not necessarily face to face, within 10 days of the date of this order in an attempt to resolve the issue of sanctions.

4. Should counsel fail to resolve the issue of sanctions, counsel for Plaintiffs may file a motion requesting sanctions and a brief in support thereof within 15 days of the date of this order. Counsel for Central Susquehanna Intermediate Unit 16 may file a brief in opposition to any motion for sanctions filed by Plaintiffs' counsel within 10 days of the filing of such a motion. Plaintiffs may file a reply brief within 5 days of the filing of any opposing brief.

5. Should counsel be unable to resolve the issue of sanctions and a motion be filed, failure to oppose that motion shall result in the awarding of attorney's fees.

/s/ Muir
MUIR, U.S. District Judge

MM:bd